

Legal Summary of the three Federal Energy Regulatory Commission (FERC) Orders Related to the Combined Heat and Power Feed-in Tariff Program

FERC Declaratory Order: On May 4, 2010, the Commission submitted a petition for declaratory order to FERC to find that the Federal Power Act (“FPA”), the Public Utility Regulatory Policies Act of 1976 (“PURPA”) and FERC regulations do not preempt the Commission’s decision to require California utilities to offer a certain price to CHP generating facilities of 20 MW or less that meet specific energy efficiency requirements. In response, on July 15, 2010, FERC issued *California Public Utilities Commission et al.* (“*FERC Declaratory Order*”), (2010) 132 FERC ¶ 61,047. The FERC Declaratory Order found that the Commission could implement its program pursuant to PURPA. To comply with PURPA, FERC found that the Commission’s AB 1613 CHP program needed to meet two requirements: (1) the CHP generators must be QFs pursuant to PURPA; and (2) the rate established by the Commission should “not exceed the avoided cost of the purchasing utility.” (*Id.* at P 67.)

FERC Clarification Order: On August 16, 2010, the Commission filed with FERC a request for clarification of certain findings in the FERC Declaratory Order. On October 21, 2010, FERC issued an order, which granted the Commission’s August 16, 2010 request for clarification. (*California Public Utilities Commission* (“*FERC Clarification Order*”) (2010) 133 FERC ¶ 61,059.) In this order, FERC clarified that the state has a wide degree of latitude in setting avoided cost, can utilize a multi-tiered avoided cost rate structure, and that this approach is consistent with the avoided cost requirements set forth in Section 210 of PURPA. (*Id.* at PP 24 & 30.) FERC also clarified that state procurement obligations can be considered when calculating avoided cost, and it specifically overruled its prior holding from *SoCal Edison* to the extent its current determination was inconsistent with that clarification. (*Id.* at PP 29-30 referring to *SoCal Edison* (1995) 71 FERC ¶ 61,269 at 62,080.)

FERC Rehearing Order: On January 20, 2011, FERC denied rehearing of its *Clarification Order*. (*California Public Utilities Commission* (“*FERC Rehearing Order*”) (2011) 134 FERC ¶ 61,044.)